

Avanti: The Evolving “Spectrum” of Control Sufficient for Fixed Charge Security Under English Law

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At a Glance

The English Court yesterday held that a charge granted by Avanti was properly characterised as a fixed (and not floating) charge. In a helpful decision for creditors taking fixed charge security, the court held that limited permissions for the chargor to deal with the charged assets were not fatal to this characterisation. Critically, Avanti was not permitted under the transaction documents to dispose of the relevant assets in the ordinary course of its business and the relevant assets did not constitute anything resembling “fluctuating assets” or “circulating stock in trade”.

This is the first major case on the distinction between fixed and floating charges since the House of Lords’ seminal judgment in *Re Spectrum Plus*¹, which recharacterised a purported fixed charge over book debts as a floating charge because the chargor was free to use the secured assets and therefore the security-taker lacked the requisite degree of control over the assets to constitute a fixed charge.

The categorisation of charges as “fixed” or “floating” under English law is all the more important now that HMRC (the UK tax authority) ranks as a preferential creditor in respect of certain taxes in insolvency proceedings – i.e., such taxes rank behind fixed charge realisations but above floating charge realisations; see our [Alert](#). This characterisation significantly impacted which creditors get paid what under the “waterfall” in Avanti’s administration proceedings: because the charge is properly characterised as a fixed charge, the secured creditors recover in full, whereas if the charge had been characterised as a floating charge, then part of the realisations would

have had to be paid to HMRC (as preferential creditor) and unsecured creditors up to the “prescribed part” limit of £800,000.

The “fixed vs floating” charge question was not the only complex issue in this case. As Avanti’s restructuring involved a change of control of a satellite operator, it required advance clearance as a “notifiable acquisition” under the UK’s National Security and Investment Act, which came into force in January 2022. We understand this was the first restructuring deal to obtain clearance under that regime.

Additionally, the deal was structured to achieve prompt completion without awaiting the court’s judgment on the “fixed vs floating” characterisation, whilst ensuring appropriate protection for affected creditors in the interim. The mechanics for this are explored below.

The judgment is [here](#).

Factual Background

Avanti Group is a UK-based satellite operator that employs satellite technology across Europe, the Middle East and Africa. Avanti’s restructuring was implemented by way of a super-senior led enforcement by Kirkland’s clients, to appoint administrators and effect a double pre-pack administration under which Avanti’s business was sold to a newco structure set up and owned by the secured creditors.

The pre-pack sale permitted onerous liabilities (including HMRC) to be stranded at the insolvent company, which was crucial to deleveraging the group’s balance sheet.

Avanti Communications Ltd (the “**Company**”) and its administrators sought a determination of whether certain assets sold by the Company via the pre-pack administration were secured by fixed or floating charges.²

The relevant assets comprised certain satellite equipment, certain equipment used in the operation of network and ground station facilities, certain satellite network filings (which essentially comprised the Company’s rights to use certain valuable orbital slots in relation to satellites) and certain ground station licences issued by the Office of Communications (Ofcom) (together, the “**Relevant Assets**”).

The administrators adopted a neutral stance on the application. HMRC did not wish to be heard in the application. The lead secured creditors (Kirkland’s clients) successfully

submitted that the Relevant Assets were secured by fixed charges.

Legal Background

The court conducts a two-stage process in determining whether a charge is fixed or floating:

1. Construe the security document and seek to ascertain – from the relevant language – the parties’ intentions as to the nature of the rights and obligations they intended to grant each other in respect of the charged assets. The nature of the relevant assets and the chargor’s business may be taken into account; post-contractual conduct is generally irrelevant.
2. Characterise whether the parties’ intentions were to grant the company rights in respect of the charged assets that are inconsistent with the nature of a fixed charge. This is a matter of law and operates irrespective of the parties’ intentions or the label used by the parties. The critical question is the degree of control; any unfettered or significant commercial freedom in the chargor to deal with a fluctuating class of assets without the chargee’s consent will be inconsistent with the existence of a fixed charge over those assets.

Certain academic commentary following *Re Spectrum Plus* had suggested that only total prohibition of all dealings and withdrawals without permission (or total restriction on any disposal of the charged assets by the chargor without the consent of the chargee) would suffice to create a fixed charge. If correct, then the security agreement in *Avanti* could not have created a fixed charge over the Relevant Assets, given the Company retained limited ability to deal with the assets.

Judgment

The court held that:

- the House of Lords’ judgment in *Re Spectrum Plus* did not support statements in academic commentary to the effect that a total prohibition on disposals is required before a charge can be fixed;
- although it is helpful to look at the range of possibilities as a spectrum (with total freedom of management at one end of the spectrum and a total prohibition on dealings of any kind at the other end of the spectrum), this did not mean that a

charge could only be fixed if it is located at the “total prohibition” end of the spectrum;

- instead, the case law supports a more nuanced approach, which depends upon a combination of factors;
- it is not sensible or feasible to try to identify the location of the point on the spectrum of possibilities where a floating charge gives way to a fixed charge, or *vice versa*;
- where the charged assets are naturally fluctuating (such as stock or book debts), the court will readily conclude that a liberty for the chargor to deal with the charged assets is inconsistent with a fixed charge; in contrast, where the assets are specific and do not necessarily fluctuate, some liberty to release the charged assets may not be inconsistent with a fixed charge;
- accordingly, Avanti’s charge over the Relevant Assets was not necessarily a floating charge simply because the Company had some ability, under the terms of the security documents, to deal with the Relevant Assets; and
- ultimately, the charge in *Avanti* was properly characterised as a fixed charge, given:
 - the Company’s freedom to deal with the Relevant Assets was “materially and significantly” limited;
 - the Relevant Assets were all subject to considerable restrictions upon their disposal;
 - the scope of exceptions to the asset sale restrictions only provided limited opportunities to dispose of the Relevant Assets, in particular circumstances. Critically, the Company was not permitted to dispose of any of the Relevant Assets in the ordinary course of its business;
 - the Relevant Assets did not constitute anything resembling the “circulating capital”, “fluctuating assets” or “circulating stock in trade” of the Company; instead, they were more correctly characterised as tangible and non-tangible infrastructure, which the Company used to generate income. The Relevant Assets did not need to be sold to generate this income and (to varying degrees) were inherently difficult to transfer;
 - accordingly, the Relevant Assets could perfectly well have been the subject of a fixed charge; and
 - following detailed consideration of the underlying transaction documents, and in all the circumstances, it was quite clear that the charge took effect as a fixed charge.

Structuring of completion pending judgment

To avoid holding up the transaction pending yesterday's judgment, Kirkland helped devise a structure whereby the administrators agreed to transact (and make distributions to secured creditors) as if the assets were subject to a fixed charge, subject to:

1. commencing a directions application post-closing to determine whether the assets were secured by a fixed or floating charge (i.e., the present case); and
2. adequate protection for preferential creditors (and the "prescribed part" set aside for unsecured creditors) in the event that the court had determined that the charges were floating only. Specifically: the administrators were given access to a specific funding facility that – in the event that the security had been recharacterised as a floating charge – could have been drawn down and paid to the relevant creditors. As this cash in effect would have come from creditors that had already received a fixed charge distribution, this was akin to a repayment of the proceeds to the administration estate for redistribution in accordance with the waterfall that would have applied if the assets were subject to floating charge security.

This innovative structure successfully achieved prompt completion of the restructuring whilst ensuring appropriate protection for affected creditors pending the court's judgment in this case.

Kirkland advised the lead super-senior creditors in this matter, led by restructuring partner [Sean Lacey](#) and litigation partner [Richard Boynton](#).

1. [2005] UKHL 41↩

2. As no crystallisation of any floating charge had occurred, this depended on the nature of the security over the relevant assets when the security was originally created.↩

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Suggested Reading

- 26 April 2023 Speaking Engagement PLI's Bankruptcy & Reorganizations 2023: Current Developments
- 24 April 2023 Kirkland Alert Adler: English Court Approves Contested Restructuring Plan
- 11 April 2023 Press Release Kirkland Advises Apex Group on Acquisition of MJ Hudson Businesses

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